Supreme Court, U.S.
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No. 93-1816

In The

Supreme Court of the United States

October Term, 1993

SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., A GEORGIA CORPORATION, QUALIFIED TO DO BUSINESS IN ALABAMA; FRANK JENKINS, M.D., AN INDIVIDUAL; NILES V. FLOYD, AN INDIVIDUAL,

Petitioners,

v.

THOMAS A. LORANCE, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Respondent does not accept or agree to the questions presented by the Petitioners, however, the Respondent declines to rewrite the Petitioners' questions presented inasmuch as they are the legal issues sought to be reviewed by Petitioners. Rather, Respondent presents the following as grounds in support of the denial of Petitioners' Petition for Writ of Certiorari.

1. The same or similar legal issues presented by Petitioners in this case are presently before this Court in Case No. 93-1001, *Allied-Bruce Terminix Company, Inc. v. Dobson*, certiorari granted March 21, 1994, the decision of which will not be substantially aided by the granting of certiorari in this case.

2. The facts presented in this particular case support a finding that interstate commerce was *not involved* in the performance of a personal services contract. Therefore, the application of the higher "slightest nexus" standard argued for by Petitioners does not provide a basis for granting the Petition for Writ of Certiorari

3. Respondent cannot be compelled to arbitrate his claims against individual defendants Jenkins and Floyd since neither Jenkins nor Floyd was a party to the personal services contract containing the arbitration provision.

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SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., A GEORGIA CORPORATION, QUALIFIED TO DO BUSINESS IN ALABAMA; FRANK JENKINS, M.D., AN INDIVIDUAL; NILES V. FLOYD, AN INDIVIDUAL,

Petitioners,

v.

THOMAS A. LORANCE, M.D.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Thomas A. Lorance, M.D. ("Lorance"), respectfully files this Brief in Opposition to the Petition for Writ of Certiorari filed by Southern Health Corporation of Hamilton, Inc. ("SHCH"), Frank Jenkins, M.D. ("Jenkins") and Niles V. Floyd ("Floyd") and requests this Court to decline to exercise its discretion and deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This litigation began on March 4, 1993, with the filing of a civil summons and complaint in the Circuit Court for Marion County, Alabama, by Thomas A. Lorance, M.D. ("Dr. Lorance") against Southern Health Corporation of Hamilton, Inc., a Georgia corporation ("SHCH"), Frank Jenkins, M.D., a Georgia resident and Niles V. Floyd, an Alabama resident. Dr. Lorance's Verified Complaint (App. pp. 1-18) alleges causes of action for (i) breach of contract, (ii) equitable accounting, (iii) innocent, reckless and intentional fraud and/or deceit under *Ala. Code* §§ 6-5-101 through 104 and (iv) tortious interference with contractual relations. The breach of contract claim flows from the unjustified termination by SHCH of a personal professional medical services contract labeled a Net Income Guarantee Agreement (the "Agreement"). (Pet. App. p. 29). The fraud allegations arise out of representations made by Jenkins, Floyd and others that induced Dr. Lorance to enter into the Agreement. The Verified Complaint further alleges that the defendants' actions were part of an ongoing pattern or practice to deceive and defraud medical doctors who entered into Net Income Guarantee Agreements or similar agreements with SHCH for services to be performed in Hamilton, Alabama. Dr. Lorance contends that the Agreement was summarily terminated by SHCH as a result of SHCH's loss of its license to manage and operate the Marion County Alabama General Hospital.

The stated purpose of the Agreement is for Dr. Lorance to provide medical and surgical services to the citizens of Marion County, Alabama and in doing so support SHCH's lease and management of Marion County General Hospital. Under the terms of the

Agreement, Dr. Lorance was required to establish a full-time medical/surgical practice including his performance of certain professional medical/surgical services and emergency room and "on-call" duties at Marion County General Hospital in Hamilton, Alabama. Dr. Lorance was further required to obtain an Alabama medical license and adhere to standards commensurate with such in the State of Alabama.

Following the filing of Dr. Lorance's complaint, the defendants filed a Motion to Dismiss along with the demand of SHCH for arbitration. Within thirty (30) days of the demand, Dr. Lorance, on May 11, 1993, filed his Motion to Stay Arbitration and an Objection to Defendants' Motion to Dismiss. (App. p. 19). No affidavits were filed by either party until the time of oral argument on Dr. Lorance's Motion to Stay when Dr. Lorance filed his Affidavit (App. p. 22) simultaneously with SHCH's filing of the Affidavits of Dr. Gerald Franklin Jenkins (Pet. App. p. 12) and Phillip H. Eastman, III (Pet. App. p. 23). The Circuit Court of Marion County entered its Order compelling arbitration on October 20, 1993. On October 29, 1993, Dr. Lorance filed his Petition for Extraordinary Writ of Mandamus with the Supreme Court of Alabama.

During the pendency of Dr. Lorance's Motion to Stay Arbitration in the Circuit Court and until such time as the Supreme Court of Alabama rendered its order staying the arbitration, Dr. Lorance responded to SHCH's demand for arbitration under protest. Both written and oral protests were made to SHCH, as well as to the American Arbitration Association ("AAA"), before whom SHCH brought the arbitration. Dr. Lorance has at all times maintained his right to a jury trial on all issues and has

protected his right to such throughout all proceedings. *Bergquist Co. v. Sunroc Corp.*, 777 F. Supp. 1236, 1251 (E.D. Pa. 1991) (party does not vitiate its objections by participating in the initial phases of the arbitration process.)

REASONS FOR DENYING THE WRIT

I. THE SAME OR SIMILAR LEGAL ISSUES PRESENTED BY PETITIONERS IN THIS CASE ARE PRESENTLY BEFORE THIS COURT IN CASE NO. 93-1001, *ALLIED-BRUCE TERMINIX COMPANY, INC. V. DOBSON*, CERTIORARI GRANTED MARCH 21, 1994, THE DECISION OF WHICH WILL NOT BE SUBSTANTIALLY AIDED BY THE GRANTING OF CERTIORARI IN THIS CASE.

This Court presently has pending before it Case No. 93-1001, *Allied-Bruce Terminix Company, Inc. v. Dobson ("Dobson")*, certiorari granted March 21, 1994, on the following question presented:

> Did Alabama Supreme Court correctly hold, contrary to view taken by most state and federal courts, that Section 2 of FAA is inapplicable to contracts otherwise involving interstate commerce if parties did not "contemplate [ ] substantial interstate activity" at time of contract?

This Court also has pending before it two Petitions for Writ of Certiorari which, at the time of the printing of this brief, have not been acted upon by this Court: Case No. 93-995, *Home Buyers Warranty Corp. II v. Lopez ("Lopez")* and Case No. 93-1000, *Terminix International Company Limited Partnership v. Jackson ("Jackson")*.

The question presented in *Jackson* is identical to that presented in *Dobson*. The questions and legal arguments presented in *Lopez* were adopted almost verbatim by the Petitioners in the instant case. Although the questions presented in the instant case and *Lopez* are phrased differently from the questions in *Jackson* and *Dobson*, the legal issue is the same. All petitioners have challenged the Alabama Supreme Court's standard in applying the Federal Arbitration Act ("FAA") only in cases wherein the parties at the time of the making of the contract containing the arbitration provision contemplated interstate activity.

Inasmuch as the legal issues will not be substantially furthered or presented differently by the arguments of either SHCH or Dr. Lorance, Dr. Lorance urges this Court to deny SHCH's Petition For Writ of Certiorari in this matter, or in the alternative, to withhold ruling on SHCH's Petition pending this Court's opinion in *Dobson*. With the *Dobson* case pending on the same legal issue, the questions presented by SHCH certainly do not rise to the level of a "special" or "important" reason for granting certiorari or an important or novel question of federal law as discussed in this Court's Rule 10. SHCH's wholesale adoption of the questions presented and legal arguments in *Lopez* further underscores the lack of novelty presented herein. SHCH's issues focus solely on the legal arguments and are not fact specific to this matter. SHCH has pointed to no special factual distinction present in this case that would substantially aid the Court's review of the legal issues presented in *Dobson*.

In addition to the lack of novel legal issues presented, the facts of this case and the summary record

herein make this case less conducive to the Court's full and unfettered review of the legal questions presented. Notwithstanding the Alabama Supreme Court's review of the above facts, it is clear that the evidentiary record before this Court consists primarily of the Affidavits simultaneously submitted by the parties, Dr. Lorance's Verified Complaint, the Agreement and SHCH's termination letter to Dr. Lorance. None of the individuals submitting affidavits have been deposed or cross-examined.

Inasmuch as the questions presented by SHCH mirror almost verbatim the questions presented by *Lopez* and SHCH has adopted the legal arguments and research presented by *Lopez* and inasmuch as those questions have been and will be addressed by the respondents in *Lopez, Dobson* and *Jackson*, Dr. Lorance will not burden this Court with redundant legal rebuttal.

II. THE FACTS PRESENTED IN THIS PARTICULAR CASE SUPPORT A FINDING THAT INTERSTATE COMMERCE WAS *NOT INVOLVED* IN THE PERFORMANCE OF A PERSONAL SERVICES CONTRACT. THEREFORE, THE APPLICATION OF THE HIGHER "SLIGHTEST NEXUS" STANDARD ARGUED FOR BY PETITIONERS DOES NOT PROVIDE A BASIS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

Petitioners lament the adoption by the Alabama Supreme Court of the "contemplation" test formulated in *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied sub. nom. Jim Skinner Ford, Inc. v. Warren*, 493 U.S. 998 (1989)

and urge this Court to compel the Alabama Supreme Court to return to the test previously discussed in *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala. 1986). In *Costa & Head*, the FAA was generally interpreted to apply when there is the "slightest nexus" with interstate commerce. Petitioner confesses that the "slightest nexus" test exploits the full reach of the commerce clause.

Even using the "slightest nexus" standard, the facts of this case do not rise to such a level of interstate commerce that the Federal Arbitration Act would apply and preempt the applicable Alabama statute prohibiting the enforcement of the arbitration provision. SHCH's factual support for the requisite nexus with interstate commerce consists only of the following:

1. The so-called "negotiation" of the contract between agents of SHCH in Georgia and Dr. Lorance in California: Note that this argument refers exclusively to the negotiation of the contract and not to its performance. As argued below, the sole purpose of the Agreement was to facilitate the provision of medical services in Marion County, Alabama. The contract was to be performed *totally* within the State of Alabama.

2. The occasional and ill-defined communications between Dr. Lorance in Alabama and agents of SHCH in Georgia by telephone or mail: As argued below, even pursuant to the "slightest nexus" test advocated by SHCH, the occasional use of the telephone and mail to discuss activity that is otherwise being performed totally within the State of Alabama is not sufficient to be deemed

interstate commerce and bring the parties' conduct within the FAA. *First Real Estate Corp. v. Brown Marx Tower Limited Partnership*, 620 So. 2d 648 (Ala. 1993). SHCH can only cite four letters from Dr. Lorance to officers of SHCH in Atlanta. As the Court will note these letters, which are set forth at Petitioner's App. 15-22, are actually only two letters, each sent to two different people that involve the proposed purchase of equipment for the hospital, and not for Dr. Lorance's practice.

3. The provision in the Agreement that it will be interpreted according to Georgia law.

4. Dr. Lorance's use of a California address in the notice provision of the Agreement at a time prior to his move to Alabama.

5. Intra-corporate transfers of funds from Georgia to Alabama prior to such funds being paid to Dr. Lorance from an Alabama bank account: As set forth in Dr. Lorance's Affidavit, all payments by SHCH to him pursuant to the Agreement were drawn on SHCH's account at an Alabama bank. SHCH's unspecific narrative of intra-corporate transfers of funds to an Alabama bank account where such funds were presumably commingled with funds for other purposes and from other sources does not change the fact that the exclusive focus of the agreement was the establishment of Dr. Lorance's medical practice in Alabama. Dr. Lorance had no involvement whatsoever in the internal financial affairs of SHCH and such transactions have no relevance to this case.

These issues were addressed in detail in the opinion by the Alabama Supreme Court. It is important to note that the Alabama Supreme Court primarily relied on a

prior opinion decided under the "slightest nexus" test. *See First Real Estate Corp. v. Brown Marx Tower Limited Partnership*, 620 So. 2d 648 (Ala. 1993). In *Brown Marx*, the parties were an out of state property owner and an Alabama commercial real estate management firm. The Alabama Supreme Court, using the "slightest nexus" test, determined that "mere use of the telephone and mail by persons in different states to communicate about activity that is purely local is too slight to constitute such a nexus." *Brown Marx*, 620 So. 2d at 649.

The Alabama Supreme Court relied heavily on *Brown Marx* and was persuaded on such basis that the communications between SHCH and Dr. Lorance "both during the negotiation of the contract and its performance concerned an activity that was purely local, namely, the establishment of a surgical practice in Hamilton, Alabama." As further noted by the Alabama Supreme Court, "the scope of the contract consisted principally of establishing a medical practice in Hamilton, Alabama, to provide surgical services mainly to Alabamians in Marion County." As is clear from its opinion, the Alabama Supreme Court relied heavily on the *Brown Marx* case and considering the analogous factual situations involved, would most likely find that the facts presented by SHCH and Dr. Lorance fail to involve even the slightest nexus with interstate commerce.

Pursuant to the Agreement, Dr. Lorance established his residence and a full-time medical practice in Marion County, Alabama. He obtained a license to practice medicine in the State of Alabama and was granted hospital

privileges at Marion County General Hospital. He performed on-call services at Marion County General Hospital, was a member of the staff of the hospital and became involved in many activities of the hospital. He established an office in Hamilton, Alabama, where he directed nurses and other hospital staff personnel. He maintained regular office hours, treated patients in his office and performed surgery at Marion County General Hospital. All payments that he received pursuant to the Agreement were received from Marion County General Hospital and were drawn on the hospital's account at SouthTrust Bank in Hamilton, Alabama. At no time did Dr. Lorance receive funds directly from Georgia. At no time during the term of the Agreement did Dr. Lorance travel to the State of Georgia to consult, visit or negotiate with anyone representing or otherwise involved with SHCH.

The facts presented in this case do not clearly present circumstances involving interstate commerce such that this Court should involve itself in a fact finding and interpretative exercise. Deference should be given to the Alabama Supreme Court for its interpretation of the facts. This Court should not exercise its discretionary review jurisdiction where the facts of this case unequivocally do not involve interstate commerce.

III. RESPONDENT CANNOT BE COMPELLED TO ARBITRATE HIS CLAIMS AGAINST INDIVIDUAL DEFENDANTS JENKINS AND FLOYD SINCE NEITHER JENKINS NOR FLOYD WAS A PARTY TO THE PERSONAL SERVICES CONTRACT CONTAINING THE ARBITRATION PROVISION.

The Agreement that contains the arbitration provision sought to be enforced by SHCH was entered into solely between SHCH, a corporation, and Dr. Lorance. Neither Jenkins nor Floyd is a party to that contract nor is either individual defendant a party to any contract with Dr. Lorance containing an arbitration provision. It is well settled that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). *See also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). "A duty to arbitrate does not arise because a court thinks it is a good thing to require in the circumstances or because national policy favors it. A party cannot be required to submit to arbitration a dispute that it has not agreed to arbitrate." *Road Sprinkler Fitters Local Union 669 v. Independent Sprinkler Corp.*, 10 F.3d 1563, 1567 (11th Cir. 1994).

This issue was first raised in this case by Dr. Lorance in his Objection to Defendants' Motion to Dismiss (App. p. 19). Furthermore, SHCH's Demand for Arbitration (App. p. 26) makes no reference to a demand by or on behalf of defendants Jenkins or Floyd. Moreover, the Demand for Arbitration filed by SHCH before the AAA

listed only SHCH as a claimant and did not refer to or make demand for arbitration by or on behalf of Jenkins or Floyd.

Although unclear from the body of SHCH's argument, it appears that this Petition is brought not only on behalf of SHCH, but also on behalf of defendants Jenkins and Floyd. To the extent that such is the case, the Petition is due to be denied on the basis that Jenkins and Floyd can point to no written arbitration agreement wherein Dr. Lorance agreed to arbitrate his claims against them. Absent such a writing, 9 U.S.C. § 3 of the Federal Arbitration Act does not apply.

CONCLUSION

This matter is not of such importance and legal precedence that the United States Supreme Court should invest its limited resources by exercising its discretion to grant SHCH's Petition for Writ of Certiorari. To the extent that the Supreme Court wishes to address the State of Alabama's standard for determining when the Federal Arbitration Act applies, this Court has the opportunity to do so in other matters presently on its docket.

The facts of this case present no new legal issues but, to the contrary, present facts less conducive to this Court's review than those presented in the other Alabama cases presently pending before this Court. In addition, the facts of this case, even when viewed under the "slightest nexus" test, do not involve interstate commerce to such an extent that this Court should set aside the well-reasoned decision of the Alabama Supreme Court.

Moreover, Dr. Lorance has set forth sufficient grounds for denial of SHCH's Petition in that Petitioners Jenkins and Floyd do not have a written arbitration agreement that can be enforced against Dr. Lorance and, accordingly, this Petition is due to be denied as to such parties.

WHEREFORE, based on the above, Respondent respectfully requests this Honorable Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT FOR MARION COUNTY, ALABAMA

THOMAS A. LORANCE, M.D., an individual, Plaintiff, VS. SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., a Georgia corporation, qualified to do business in Alabama; FRANK JENKINS, M.D., an individual; NILES V. FLOYD, an individual; FICTITIOUS PARTIES: (1) those entities or individuals that own the business conducted as Southern Health Corporation of Hamilton, Inc.; (2) those entities or individuals that are the general partners or owners of the business conducted as Southern Health Corporation of Hamilton, Inc.; (3) those entities or individuals that operate the business known as Southern Health Corporation of Hamilton, Inc.; (4) those entities or individuals that are the general partners of the operator of the business known as Southern Health Corporation of Hamilton Inc.; (5) those entities or individuals other than those entities or individuals described	CIVIL ACTION NUMBER: CV 93-57 (Filed March 04, 1993)

above whose wrongful conduct contributed to cause the occurrence made the basis of this suit; (6) those entities or individuals other than those described above, that are the successor in interest of any of the entities or individuals described above. Plaintiff avers that the identity of the fictitious parties described herein is otherwise unknown to plaintiff at this time, or if their names are known to plaintiff at this time, their identities as proper party defendants are not known to plaintiff at this time and their true names will be substituted by amendment when the aforesaid acknowledgment is ascertained.,

Defendants.

VERIFIED COMPLAINT

---

1. Thomas A. Lorance, M.D. ("Dr. Lorance") is an individual and a licensed physician in the State of Alabama who at the time of the events alleged in this complaint had a general surgery practice in Hamilton, Alabama with his principal place of business being located at 1325 Military Street South, Hamilton, Alabama.

2. Defendant Southern Health Corporation of Hamilton, Inc. ("Southern") is a corporation organized and existing under the laws of the State of Alabama, with its principal place of business located in Hamilton, Alabama.

3. Defendant Frank Jenkins, M.D. ("Jenkins") is an individual and a licensed physician whose residence is unknown. Jenkins at all times alleged herein acted as an officer, agent and/or employee of Southern or to the extent acting on his own behalf has acted in concert and conspiracy with Southern.

4. Defendant Niles V. Floyd ("Floyd") is an individual and a resident of Tuscumbia, Alabama. Floyd at all times alleged herein acted as an agent or employee of Southern or to the extent acting on his own behalf has acted in concert and conspiracy with Southern.

5. At all material times, fictitious defendants numbers one, two, three, four, five and six were the owners and operators and general partners of the owners and the operators of the business known as Southern Health Corporation of Hamilton, Inc. These defendants knew of, authorized, ratified, performed or are otherwise liable for the acts complained of herein. At all material times, fictitious defendants numbers five and six were agents or employees of Southern or the entities that own or operate Southern and were acting within the purposes and scope of their agency or employment. The acts and conduct alleged herein of each such defendant were known to, authorized or ratified by their principals.

6. On or about March 24, 1992, and at times immediately preceding thereto, plaintiff Dr. Lorance was induced by defendants Southern, Jenkins, Floyd and the fictitiously named parties to move his practice and home from Redding, California to Hamilton, Alabama and to enter into a Net Income Guarantee Agreement (the

"Agreement") with defendant Southern. A true and correct copy of the Agreement is attached hereto and incorporated herein by reference as Exhibit "A".

7. Plaintiff Dr. Lorance was induced by defendants to enter into the Agreement as a result of promises and representations made to him by defendants, to-wit:

(a) To guarantee Dr. Lorance an income subsidy in an amount not to exceed $15,000.00 per month or the amount necessary to subsidize Dr. Lorance's actual net practice income so as to guarantee Dr. Lorance a net practice income of $15,000.00 per full calendar month, not to exceed a total of $180,000.00 in any consecutive twelve month period.

(b) To pay such subsidy as referred to in Paragraph 6(a) above within five (5) days of receipt of reporting from Lorance.

(c) To assist Lorance in organizing/setting up his office, ordering supplies, hiring personnel, setting up accounting records and marketing and promoting Lorance's practice.

(d) To assist Lorance in setting up his practice by timely and expeditiously remodeling the operating room and facilities at Marion County General Hospital.

(e) To assist Lorance in setting up his practice by promoting and encouraging surgical referrals to Lorance in order to provide Lorance an adequate patient base.

(f) To purchase modern surgical equipment or to otherwise provide such equipment on a timely and as needed basis to Lorance for

performance of his medical practice and surgery, such equipment to include but not limited to, endoscope and laparoscopic equipment.

(g) To in good faith live up to the terms of the Agreement.

(h) To otherwise cooperate with Dr. Lorance in organizing/setting up his office and practice and to encourage and allow actions which would promote and further Dr. Lorance's skill, credentials and reputation.

8. Defendants' rights to terminate the Agreement were limited to certain occurrences enunciated in Article IX of the Agreement. Said occurrences are as follows:

(a) Physician fails to obtain an Alabama State Medical License prior to June 1, 1992, or said license is revoked or suspended by the State of Alabama.

(b) Physician's medical staff privileges at Marion County General Hospital or Lamar Regional Hospital are terminated in accordance with Medical Staff Bylaws.

(c) Physician's professional liability insurance is cancelled.

(d) Physician's application for medical staff at Marion County General Hospital or Lamar Regional Hospital is denied for whatever reason.

(e) Material breach of this Agreement by Physician.

(f) Physician does not diligently attempt to establish and maintain an economically viable practice in Hamilton, Alabama, as

determined in the sole discretion of the Company.

(g) Death or long-term disability (defined as an inability to work for sixty (60) consecutive days) of Physician.

(h) 90 days following written notice to Physician for reasons other than cause.

Dr. Lorance avers that none of the occurrences set forth above have occurred as of the filing of this Complaint.

9. Dr. Lorance avers that he has fully complied with all conditions precedent required by the Agreement, to-wit:

(a) At all times relevant to this action, Dr. Lorance provided a full range of surgical medicine and services to the residents of Hamilton, Alabama, and the surrounding area similar and consistent with services provided by other surgical physicians practicing in the State of Alabama. Such services included surgical consultation, surgical procedures, follow-up, hospital rounds, office visits, consultation and establishment of referral arrangements with the community and other physicians.

(b) Dr. Lorance provided medical treatment consistent with the accepted medical standards and in accordance with the medical staff bylaws, rules and regulations, and policies and procedures established and adopted by the governing body and medical staff for Marion County General Hospital.

(c) Dr. Lorance has provided full time medical care and treatment to his patients with hours in excess of forty (40) hours per week as needed and has maintained reasonable office hours in the development of his practice.

(d) Dr. Lorance furnished and made available to Southern all financial and practice records which they requested.

(e) Dr. Lorance in no way prevented Southern from conducting any audit of Dr. Lorance's records, books or designated bank accounts.

(f) Dr. Lorance billed each patient within ten (10) days of the services rendered and made diligent attempts to collect receivables as expediently as possible or, in the alternative, allowed Southern on a contract basis to perform these billing functions on his behalf.

(g) Dr. Lorance has diligently attempted to establish and maintain and has established and maintained a full-time and viable practice in Hamilton, Alabama.

(h) Dr. Lorance has provided emergency room on-call coverage in accordance with the Medical Staff Bylaws of Marion County General Hospital and has in fact volunteered and exceeded the amount of emergency room hours necessary to satisfy such Medical Staff Bylaws.

(i) Dr. Lorance has been available for off hour, weekend and holiday on-call treatment, procedures and consultation, many of such times when there was no other available

surgeon on-call in Marion County or available at Marion County General Hospital.

(j) Dr. Lorance has advised defendant Southern and the staff at Marion County General Hospital of continuing medical education courses and seminars and has attended such with the concurrence and permission of Southern and the hospital staff. Said continuing medical education and seminars have proved valuable to Dr. Lorance and defendants in establishing and furthering Dr. Lorance's and Marion County General Hospital's reputation and credentials.

(k) Dr. Lorance has met and complied with limitations on vacation and continuing medical education.

10. At all times relevant to the matters contained herein, Dr. Lorance complied with the conditions set forth in the Agreement between himself and defendant Southern. Dr. Lorance obtained an Alabama Medical License prior to June 1, 1992. His license has never been suspended or revoked by the State of Alabama. Dr. Lorance's medical staff privileges at Marion County General Hospital and Lamar Regional Hospital have not been cancelled for any reason. Dr. Lorance has in no way breached the Agreement, as he has complied with all requirements and conditions therein. Dr. Lorance has diligently attempted to establish and has established a viable practice in Hamilton, Alabama. Dr. Lorance is not suffering under any long-term disability. Dr. Lorance has not consented to the termination of the Agreement.

11. Notwithstanding Dr. Lorance's faithful performance of the Agreement, on January 29, 1993, defendants

undertook a course, scheme and conspiracy to wrongfully terminate the Agreement and destroy Dr. Lorance's business, practice and livelihood. To this end, defendants notified Dr. Lorance by letter that Southern was terminating the Agreement immediately. A true and correct copy of defendants' letter of January 29, 1993 is attached hereto and incorporated herein by reference as Exhibit "B".

12. As a result of the foregoing actions by defendants, Dr. Lorance has been caused to suffer damage and will continue to suffer irreparable harm and injury by the loss and destruction of his medical practice.

13. Notwithstanding Dr. Lorance's faithful performance of the Agreement, defendant Southern and the fictitiously named defendants have breached the Agreement and have failed to abide by its terms. Specifically, defendants have failed and/or refused:

(a) To fully and faithfully live up to the terms of the Agreement by advising by letter of January 29, 1993 of their intention to terminate the Agreement immediately without just cause;

(b) To pay income subsidies to Dr. Lorance as provided in the Agreement for the remaining term of the Agreement;

(c) To assist Lorance in organizing/setting up his office, ordering supplies, hiring personnel, setting up accounting records and marketing and promoting Lorance's practice.

(d) To assist Lorance in setting up his practice by timely and expeditiously remodeling the operating room and facilities at Marion County General Hospital.

(e) To assist Lorance in setting up his practice by promoting and encouraging surgical referrals to Lorance of patients in order to provide Lorance an adequate patient base.

(f) To purchase modern surgical equipment or to otherwise provide such equipment on a timely and as needed basis to Lorance for performance of his medical practice and surgery, such equipment to include but not limited to, endoscope and laparoscopic equipment.

(g) To in good faith live up to the terms of the Agreement.

(h) To otherwise cooperate with Dr. Lorance in organizing/setting up his office and practice and to encourage and allow actions which would promote and further Dr. Lorance's skill, credentials and reputation.

COUNT ONE

(BREACH OF CONTRACT)

14. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 13 above as if set out in full herein.

15. Defendant Southern and fictitiously named defendants have materially and wrongfully breached the Agreement as set out above.

16. Plaintiff avers that as a result of defendant Southern's material breach of the Agreement he has been caused to suffer the following damages:

(a) He has lost the guarantee of income for the remaining term of the Agreement.

(b) He has been caused to lose his practice and livelihood and ability to practice his chosen profession in Marion County, Alabama.

(c) He has been caused to suffer extreme embarrassment, humiliation, loss of reputation in the community and extreme mental and emotional anguish.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, for the sum of Seven Hundred Fifty Thousand Dollars ($750,000), interest, attorneys' fees and costs of court or in such sums as the jury shall deem just.

COUNT TWO

(REQUEST FOR ACCOUNTING)

17. Plaintiff reallages and reavers each and every allegation contained in Paragraphs 1 through 16 above as if set out in full herein.

18. Plaintiff acknowledges receipt of some payment from defendants pursuant to the Agreement but does not have sufficient information from which to determine if all such payments due plaintiff under the Agreement have been made.

19. Plaintiff acknowledges that defendants have made some payments on his behalf for expenses but does not have sufficient records from which to determine the amount of such payments made or if all expenses incurred by plaintiff which are the obligation of defendants have been paid.

20. Plaintiff requests an accounting of all such sums paid to or on behalf of plaintiff and his practice by defendants, which such accounting shall include the date of all funds received by defendants on behalf of or as a result of the practice of plaintiff, the source of all such funds received, the whereabouts of all such sums, all payments made by defendants to or for plaintiff, the name of all such payees, the date payments were made, the amount of any resulting balances due, if any, and all other necessary and available information regarding any account, funds, payments, receipts, accounts receivable or accounts payable for, by or on behalf of plaintiff.

WHEREFORE, PREMISES CONSIDERED, plaintiff respectfully requests this Court to order defendants to provide an accounting of all such funds received by or for plaintiff and all such funds paid to or for plaintiff by any defendant.

COUNT THREE

(ALA. CODE § 6-5-101)

21. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 20 above as if set out in full herein.

22. Defendants' actions in misrepresenting that they would perform under the Agreement were made willfully, or recklessly without regard for the truth made solely to induce plaintiff to enter into an agreement with the defendants. Such actions constitute a violation of Alabama Code § 6-5-101 (1975).

23. Plaintiff relied on defendants' misrepresentations to his detriment and has been damaged as a result.

24. Plaintiff alleges that the misrepresentations of the defendants were part of an ongoing pattern and practice to defraud medical doctors who entered into net income guarantee agreements or other such similar agreements with defendants in Hamilton, Alabama and all other medical facilities owned or operated by defendants.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000) compensatory damages and punitive damages in an amount to be determined by the jury, interest, attorneys' fees and costs of court.

COUNT FOUR

(ALA. CODE § 6-5-102)

25. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 24 above as if set out in full herein.

26. Defendants' intentional misconduct in suppressing from plaintiff material facts regarding their intentions not to comply and/or their ability not to comply with the Agreement when defendants had superior knowledge regarding the true nature of the contract and defendants' abilities and resources constitutes a violation of Alabama Code § 6-5-102 (1975).

27. Plaintiff reasonably relied to his detriment on the facts as represented to him by defendants.

28. Plaintiff alleges that defendants' misrepresentations are a part of an ongoing pattern and practice to defraud medical doctors who enter into net income guarantee agreements or other such similar agreements with defendants in Hamilton, Alabama and all other medical facilities owned or operated by defendants.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000) compensatory damages and punitive damages in an amount to be determined by the jury, interest, attorneys' fees and costs of court.

COUNT FIVE

(ALA. CODE § 6-5-103)

29. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 29 above as if set out in full herein.

30. Defendants' misconduct in misrepresenting their intention and ability to comply with the Agreement during the negotiations was done solely to induce plaintiff to enter into the contract and constitutes a violation of Alabama Code § 6-5-103 (1975). In reliance upon these representations, plaintiff did enter into the agreement with defendants, and was made to suffer economic injury related thereto.

31. Plaintiff alleges that defendants' misrepresentations during the contract negotiations were a part of an on going pattern and practice to defraud medical doctors who enter into net income guarantee agreements or other

such similar agreements with defendants in Hamilton, Alabama and all other medical facilities owned or operated by defendants.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000) compensatory damages and punitive damages in an amount to be determined by the jury, interest, attorneys' fees and costs of court.

COUNT SIX

(ALA. CODE § 6-5-104)

32. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 32 above as if set out in full herein.

33. Defendants' willful deception of plaintiff regarding the nature of the Agreement and defendants' intention and/or ability to perform under the contract when defendants knew that defendants did not intend or have the ability to perform under the contract was done with the intent to induce plaintiff to enter into the contract. The above-described willful deceit of defendants is a violation of Alabama Code § 6-5-104 (1975).

34. Plaintiff alleges that defendants' willful deceit is part of an ongoing pattern and practice to deceive and defraud medical doctors who enter into net income guarantee agreements or other such similar agreements with defendants in Hamilton, Alabama and all other medical facilities owned or operated by defendants.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000) compensatory damages and punitive damages in an amount to be determined by the jury, interest, attorneys' fees and costs of court.

COUNT SEVEN

TORTIOUS INTERFERENCE

35. Plaintiff realleges and reavers each and every allegation contained in Paragraphs 1 through 34 above as if set out in full herein.

36. Defendants' actions in breaching the Agreement, terminating the Agreement and all of their obligations included therein, including the termination of Dr. Lorance's practice and refusing to promote Dr. Lorance in the marketplace were malicious, taken in bad faith and constitute interference with the business relationships between Dr. Lorance and his past, current and prospective patients and clients.

WHEREFORE, PREMISES CONSIDERED, plaintiff demands judgment against defendants, jointly and severally, in the amount of Seven Hundred Fifty Thousand Dollars ($750,000) compensatory damages and punitive damages in an amount to be determined by the jury, interest, attorneys' fees and costs of court.

Plaintiff prays for such other, further and/or additional relief to which he may be entitled, the premises considered.

VERIFICATION

I, Thomas A. Lorance, M.D., individually, do hereby swear and affirm that I have reviewed the foregoing Complaint and that the information and factual allegations contained herein are true and correct to the best of my knowledge and belief.

/s/ Thomas A. Lorance
THOMAS A. LORANCE, M.D.

STATE OF ALABAMA)
)
MARION COUNTY)

I, the undersigned, a Notary Public in and for said County in said State, do hereby certify that THOMAS A. LORANCE, M.D., an individual, whose name is signed to the foregoing Verified Complaint, and who is known to me, acknowledged before me on this day, that, being informed of the contents of said Verified Complaint, he executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this *3rd* day of *March*, 1993.

/s/ Patricia Y. Comer
NOTARY PUBLIC

My commission expires: 3/20/95

/s/ Roger L. Bates
ROGER L. BATES

/s/ I. Ripon Britton, Jr.
I. RIPON BRITTON, JR.

Attorneys for Plaintiff

OF COUNSEL:
TINGLE, SEXTON, MURVIN, WATSON
& BATES, P.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
(205) 324-4400

PLAINTIFF DEMANDS TRIAL BY STRUCK JURY OF ALL ISSUES RAISED IN THIS ACTION.

/s/ I. Ripon Britton, Jr.
OF COUNSEL

Plaintiffs' Address:

c/o Tingle, Sexton, Murvin,
Watson & Bates, P.C.
Suite 900
2001 Park Place North
Birmingham, Alabama 35203

Serve Defendants by Certified Mail at:

Southern Health Corporation
of Hamilton, Inc.
c/o The Service Corporation
600 Commerce Street
Montgomery, Alabama 36104

Frank Jenkins, M.D.
c/o Southern Health Corporation
5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342

Niles V. Floyd
100 N.E. Street
Tuscumbia, Alabama 35674

[EXHIBITS TO COMPLAINT NOT SUBMITTED IN APPENDIX]

IN THE CIRCUIT COURT
FOR MARION COUNTY, ALABAMA

THOMAS A. LORANCE, M.D., an individual,	)	
Plaintiff,	)	CIVIL ACTION NUMBER:
VS.	)	CV 93-57
SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., et al.,	)	
Defendants.	)	

PLAINTIFF'S OBJECTION TO
DEFENDANTS' MOTION TO DISMISS

COMES NOW the plaintiff, Thomas A. Lorance, M.D., and in opposition to defendant's Motion to Dismiss states the following:

1. Plaintiff claims, among other causes of action, that he was fraudulently induced to enter into the contract upon which defendants now base their demand for arbitration. To the extent Plaintiff is meritorous on this claim, the contract upon which Defendant's base their demand will be void ab initio. Plaintiff's demand for arbitration should be struck as a matter of law or continued until such time as the validity of the contract is determined in this proceeding.

2. *Ala. Code* § 8-1-41(3) specifically provides that an agreement to submit a controversy to arbitration cannot be specifically enforced in this state. To the extent that the

disputed contract is valid, it requires professional medical services to be performed totally within the state of Alabama and as such there is no nexus with interstate commerce and the parties do not contemplate substantial interstate activity.

3. Plaintiff's complaint names as defendants two individual defendants, i.e. Niles V. Floyd and Frank Jenkins, M.D., neither of whom were parties to the contract in question and as such there is no grounds whatsoever for arbitration for any disputes between plaintiff and the individual defendants.

4. The defendants have not met their burden by proving by substantial evidence grounds 2, 3 or 4 in support of their motion to dismiss.

5. This motion is further supported by plaintiff's Brief in Support of Motion to Stay Arbitration and Objection to Defendants' Motion to Dismiss filed herewith.

WHEREFORE, based on the above, plaintiff Thomas A. Lorance, M.D. urges this Court to deny defendants' Motion to Dismiss and to require defendants' to answer the Complaint.

Respectfully submitted,

/s/ Roger L.Bates
ROGER L. BATES

/s/ I. Ripon Britton, Jr.
I. RIPON BRITTON, JR.

Attorneys for Plaintiff

OF COUNSEL:

TINGLE, SEXTON, MURVIN, WATSON
& BATES, P.C.
900 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203
(205) 324-4400

CERTIFICATE OF SERVICE

I do hereby certify that the above and foregoing has been served by United States Mail, properly addressed and postage affixed, this the *10th* day of *May*, 1993, upon all counsel of record, to-wit:

Jeffery A. Mobley, Esquire
James, Lowe & Mobley
Post Office Box 576
Haleyville, Alabama 35565

Marlan B. Wilbanks, Esquire
Harmon, Smith, Bridges & Wilbanks
1795 Peachtree Street, N.E.
Atlanta, Georgia 30309

/s/ I. Ripon Britton, Jr.
OF COUNSEL

IN THE CIRCUIT COURT
FOR MARION COUNTY, ALABAMA

THOMAS A. LORANCE, M.D., an individual,	)	
Plaintiff,	)	CIVIL ACTION NUMBER:
VS.	)	CV 93-57
SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., et al.,	)	
Defendants.	)	

AFFIDAVIT OF THOMAS A. LORANCE

STATE OF MICHIGAN)

MECOSTA COUNTY)

BEFORE ME, the undersigned notary public, in and for said county and state, personally came and appeared THOMAS A. LORANCE, who after being duly sworn, says as follows:

My name is Thomas A. Lorance. I am the plaintiff in the above lawsuit which I filed against Southern Health Corporation of Hamilton, Inc., Frank Jenkins, M.D. and Niles V. Floyd. This affidavit is submitted in support of my Motion to Stay Arbitration. The information contained herein is based upon my own personal knowledge.

In March of 1992, I entered into a Net Income Guarantee Agreement (the "Agreement") with Southern Health Corporation of Hamilton, a copy of which is

attached as Exhibit "A" to my Verified Complaint. I entered into this Agreement based on representations made to me by Southern Health and representations made to me by Dr. Jenkins and Niles Floyd. It was my understanding based on representations made to me that Southern Health needed an additional surgeon in Hamilton to support and use Marion County General Hospital and to provide support and surgical services to the other doctors and Southern Health's other medical personnel in Hamilton.

This Agreement required me to do the following:

1. Establish a medical surgical practice in Hamilton, Alabama.

2. Within three months of establishing this practice, move my belongings and family to Marion County, Alabama.

3. As part of my practice in Hamilton, provide full-time medical care and treatment to members of the public.

4. Provide emergency room on-call coverage at Marion County General Hospital.

5. Obtain an Alabama state medical license.

6. Obtain and maintain staff privileges at Marion County General Hospital or Lamar Regional Hospital.

Pursuant to this Agreement, I moved to Marion County, Alabama and established my home residence and a full-time medical surgical practice as part of Hamilton Physicians Group, Inc. I obtained a license to practice medicine in the State of Alabama and obtained hospital

privileges at Marion County General Hospital. I performed on-call services at Marion County General Hospital, became a member of the staff at the hospital and became involved in the activities of the hospital. I set up an office in Hamilton, Alabama where I directed nurses and other staff personnel. I maintained full-time office hours and treated patients in my office and performed surgery at Marion County General Hospital.

The Agreement did not require, and I did not obtain, a license to practice medicine in any state other than Alabama. Furthermore, I did not practice medicine in any other state pursuant to this Agreement. I did not as part of my practice see patients or perform any surgery in any state other than Alabama. I do not have a license to practice medicine in Georgia or in any surrounding state. All checks I received from Marion County General Hospital were drawn off a hospital account at SouthTrust Bank in Hamilton.

I sought to promote my practice by establishing contacts with primary treating physicians in hopes of receiving surgical referrals. At no time during this Agreement did I solicit or visit any doctors outside the State of Alabama in hopes of gaining referrals.

At no time during the term of this Agreement did I travel to the State of Georgia to consult, visit or negotiate with anyone involved with Southern Health. My understanding and expectation of my duties under this Agreement consisted solely of activities, services and the practice of medicine to be performed by me solely within the State of Alabama. The terms of this Agreement did

not require me to perform any services, activities or practice medicine anywhere other than in the State of Alabama. This Agreement did not obligate me to and I did not, perform any services, activities or practice medicine outside the State of Alabama.

At the time I entered into the Agreement, I did not contemplate and was not under the impression that the Agreement would involve activity in or with states other than Alabama.

FURTHER AFFIANT SAITH NOT.

/s/ Thomas A. Lorance
THOMAS A. LORANCE

SWORN to and subscribed before me on this the *25th* day of *August*, 1993.

/s/ Karen K. Lobdell
NOTARY PUBLIC

[Karen K. Lobdell
Notary Public - Medosta County, Mich.
My commission expires 03-26-95]

SOUTHERN HEALTH CORPORATION OF HAMILTON, INC.

5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342
(404) 843-8337
FAX (404) 252-5882

April 14, 1993

Thomas A. Lorance, M.D.
P.O. Box 399
Hamilton, Alabama 35570

RE: Arbitration

Dear Dr. Lorance:

Pursuant to Article XV of our Net Income Guarantee Agreement dated March 30, 1992, we are hereby making a formal request to resolve our disputes in Atlanta, Georgia before the American Arbitration Association. We will be contacting you within approximately one week concerning the details concerning the hearing before the American Arbitration Association. In the meantime, if you have any questions, please contact us.

Sincerely,

SOUTHERN HEALTH CORPORATION OF HAMILTON, INC.

/s/ Philip H. Eastman, III
Philip H. Eastman, III
Vice President